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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CLARENCE JOSEPH ESTEEN, Defendant and Appellant.	H037392 (Monterey County Super. Ct. No. SS111011)

After pleading no contest to a felony charge of failing to register as a sex offender (Pen. Code, § 290.011, subd. (a))[1] and guilty to a misdemeanor charge of resisting arrest (§ 148, subd. (a)(1)), defendant Clarence Joseph Esteen was sentenced on July 27, 2011 to a sixteen month prison term on the felony to be served consecutively to 151 days jail on the misdemeanor. Defendant received presentence custody credit under section 4019 of 151 days (consisting of 101 actual days plus 50 days conduct credit) toward the jail sentence, and no presentence credit toward the consecutive prison term.

The sole issue raised on appeal is whether October 2011 amendments to sections 4019 and 2933 must be applied retroactively to defendant's July 2011 sentence to comport with equal protection principles. Defendant contends he should receive 50

[1] Unspecified statutory references are to the Penal Code.

additional days conduct credit under the October 2011 version of section 4019. Finding no equal protection violation, we will affirm the judgment.

BACKGROUND[2]

On April 12, 2011, Seaside police officers reviewing their agency's sex registrant database discovered that defendant was out of compliance with the requirement that he register as a sex offender. As a transient, defendant was required to register every 30 days under section 290.011, subdivision (a), and he had failed to register as of February 2011. Seaside officers then found that defendant was in custody at the Monterey County Jail in an unrelated misdemeanor case. The pending misdemeanor charges of resisting arrest (§ 148, subd. (a)(1)) and giving false information to a peace officer (§ 148.9, subd. (a)) arose from defendant's March 2, 2011 arrest in Salinas as a parolee at large.

The district attorney filed a felony complaint on May 26, 2011, charging defendant with a registration violation (§ 290.011, subd. (a)), and alleging a 1996 strike conviction for forcible rape (§§ 1170.12, subd. (c)(1), 261, subd. (a)(2)). On June 15, 2011, defendant pled no contest to the violation of section 290.011, subdivision (a) and admitted the prior strike. At the sentencing hearing on July 27, 2011, defendant pled guilty to the resisting arrest charge in the misdemeanor case. The court granted defendant's *Romero*[3] motion to strike the prior strike pursuant to section 1385, and sentenced defendant to a prison term of sixteen months in the felony case, to be served consecutively to a sentence of 151 days jail in the misdemeanor case. The court applied all presentence custody credits of 101 actual days plus 50 days conduct credit to the

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[2] Since defendant admitted the charges on which he was sentenced, the factual history is based on the probation report in the record.

[3] *Romero v. Superior Court* (1996) 13 Cal.4th 497.

misdemeanors, and awarded no presentence credits toward the consecutive felony sentence.

DISCUSSION

Defendant argues on appeal that October 2011 amendments to sections 4019 and 2933 must be applied retroactively to his sentence based on equal protection principles. Sections 4019 and 2933 create incentives for good behavior in custody by offering credit toward a defendant's total term of confinement according to prescribed formulas. Presentence credits are awarded at the time of sentencing (§ 2900.5, subd. (a)), and consist of actual days in custody, plus eligible work and good conduct credits under section 4019, subds. (b) & (c) (collectively, "conduct credit"). (See *People v. Dieck* (2009) 46 Cal.4th 934, 939, fn. 3.)

Beginning in 1982, section 4019 allowed defendants to earn conduct credit at the rate of two days for every four days of actual custody. (Stats. 1982, ch. 1234, § 7, pp. 4553-4554.) Until it was later amended (see *post*, pages 3 and 4), section 2933 did not provide for presentence conduct credit. (Stats. 1982, ch. 1234, § 4, p. 4551.)

The Legislature amended section 4019, effective January 2010, to allow some defendants to earn conduct credit at an increased rate of four days for every four days of actual custody. (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, eff. Jan. 25, 2010.) Registered sex offenders and individuals with a prior serious or violent felony conviction (as defined in §§ 1192.7, subd. (c) and 667.5(c), respectively) or whose commitment offense is a serious felony were limited under the amendment to earn two days' conduct credit for every four days in custody. (Stats. 2009-2010, 3d. Ex. Sess., ch. 28, § 50.)

The Legislature later amended section 4019, effective September 28, 2010, to return the rate of conduct credit accrual for all defendants to two days for every four days of actual custody. (Stats. 2010, ch. 426, §§ 2, 5.) At the same time, the Legislature

amended section 2933 to allow certain defendants committed to prison to earn presentence conduct credit of one day for every day of actual custody. (Stats. 2010, ch. 426, § 1.) However, individuals such as defendant with a requirement to register as a sex offender, a prior serious or violent felony conviction, or a serious felony commitment offense, were excluded from section 2933 and would instead earn conduct credit under section 4019 at the rate of two days for every four days of actual custody. (Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.) The September 2010 versions of sections 4019 and 2933 expressly applied to crimes committed on or after September 28, 2010. (Stats. 2010, ch. 426, § 2.) It was these versions that were in effect at the time of defendant's offenses in March and April of 2011.

The Legislature further amended sections 4019 and 2933, effective October 2011 (hereafter, "the October 2011 amendment"). This most recent iteration of section 4019 applies to all crimes committed on or after October 1, 2011 and allows two days conduct credit to be earned for every two days of actual custody (§ 4019, subd. (f)), while section 2933 no longer provides a separate formula for presentence conduct credit. (Stats. 2011-2012, 1st. Ex. Sess., ch. 12, § 16.) With the October 2011 amendment, all defendants sentenced to jail or prison for crimes committed on or after October 1, 2011 may earn presentence conduct credit at that rate. (§ 4019, subds. (b), (c), & (f); Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53.)

Defendant contends that he is entitled to benefit from the more generous conduct credit formula provided by the October 2011 amendment. We first observe that defendant's argument is contrary to the express language of the October 2011 amendment, which states that it "shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011." (§ 4019, subd. (h).) The amendment also specifies that "[a]ny days earned by a prisoner prior to October 1, 2011, shall be

calculated at the rate required by the prior law." (*Ibid.*) Defendant argues that the Legislature's express directive for prospective application violates the constitutional guarantee of equal protection.

To prevail on an equal protection claim, defendant must demonstrate that the state has adopted a classification that unequally affects similarly situated individuals without appropriate justification. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199-1200 (*Hofsheier*).) Defendant argues that prospective application of the October 2011 amendment of section 4019 creates two similarly situated groups: (1) inmates with specified prior or current offenses who will earn conduct credit at an enhanced rate for crimes committed on or after October 1, 2011, and (2) inmates with specified prior or current offenses who will not earn conduct credit at an enhanced rate for crimes committed before October 1, 2011.

Our Supreme Court recently decided in *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) that prospective application of the January 2010 amendment of section 4019 did not violate equal protection principles, as that amendment did not create two similarly situated groups. The Supreme Court noted that the "important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows." (*Brown, supra,* 54 Cal.4th 314, pp. 328-329.)

While the Supreme Court's decision in *Brown* concerned only the January 2010 version of section 4019, this court recently extended the reasoning and holding of *Brown* to the October 2011 version in *People v. Kennedy* (September 14, 2012, H037668) ___ Cal.App.4th ___ [2012 LEXIS 982, *17-26] (*Kennedy*). The Fifth Appellate District reached the same conclusion in *People v. Ellis* (2012) 207 Cal.App.4th 1546.

Defendant relies on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) and *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) to support his argument that prospective application of the October 2011 amendment violates equal protection. In *Kapperman*, the court held that former section 2900.5, which awarded presentence custody credit only to individuals delivered to the Director of Corrections by the statute's effective date, bore no rational relationship to a legitimate government purpose. (*Kapperman*, *supra*, 11 Cal.3d at p. 545.) The court in *Sage* held that a provision allowing presentence conduct credit for misdemeanants but not felons violated equal protection principles. (*Sage*, *supra*, 26 Cal.3d at p. 508.)

Kapperman and *Sage* were discussed and distinguished in *Brown.* (*Brown*, *supra*, 54 Cal.4th at pp. 328-330.) In *Brown*, the Supreme Court noted that *Kapperman* was concerned with actual custody credit, not conduct credit. "Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated." (*Brown*, *supra*, 54 Cal.4th at p. 330, emphasis in original.)

Defendant argues that the *Kapperman* court's favorable citation to *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604 (*Carroll*) supports the conclusion that the state has no legitimate interest in providing credit to one class of prisoner but not another. We reject this contention as *Carroll*, like *Kapperman*, dealt only with actual custody, not presentence conduct credit. Further, "the date that was considered potentially arbitrary or fortuitous in the equal protection analysis in [*Carroll*] was the date of conviction, a date out of a defendant's control, and not the date the crime was committed" as under the October 2011 version of section 4019. (*Kennedy*, *supra*, ___ Cal.App.4th ___ [2012 LEXIS 982, *22].)

The *Brown* court distinguished *Sage* as not addressing the issue of retroactivity. (*Brown, supra,* 54 Cal.4th at pp. 329-330.) The *Sage* court found no rational reason for the disparate treatment of misdemeanants and felons with regard to awarding presentence credit. (*Ibid.*) However, as the court noted in *Brown*, "[t]he unsigned lead opinion 'by the Court' in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior. A brief allusion to that argument in a concurring and dissenting opinion [citation] went unacknowledged and unanswered in the lead opinion. As cases are not authority for propositions not considered [citation], we decline to read *Sage* for more than it expressly holds." (*Brown, supra,* at p. 330.)

Defendant asserts that *Sage* implicitly held that felons are similarly situated to other inmates "regardless of their lack of awareness of the right to earn conduct credits." Like the defendant in *Brown*, defendant argues here that *Sage* foreclosed the conclusion reached in *In re Strick* (1983) 148 Cal.App.3d 906 (*Strick*) that individuals serving time before and after incentives are announced are not similarly situated. (*Brown, supra,* 54 Cal.4th at p. 330.) In *Strick*, the court found no equal protection violation in the prospective application of statutory amendments which created the opportunity for prisoners to earn work credits. (*Strick, supra,* 148 Cal.App.3d at p. 914.)

The *Brown* court specifically rejected the argument that *Sage* refutes the outcome in *Strick,* finding *Strick*'s reasoning to be persuasive. (*Brown, supra,* 54 Cal.4th at p. 329.) The *Brown* court noted with approval the rationale under *Strick* that prospective application of a statute creating a new opportunity for conduct credit is appropriate, given the " 'obvious purpose' " of such an enactment to " 'affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.' " (*Brown, supra,* 54 Cal.4th at pp. 329.)

Accordingly, we find no equal protection violation in the prospective application of the October 2011 amendment. We therefore reject defendant's contention that he is entitled to additional conduct credit.

DISPOSITION

The judgment is affirmed

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GROVER, J.*

WE CONCUR:

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RUSHING, P.J.

_____
ELIA, J.

*Judge of the Monterey County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.